IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 6TH SEPTEMBER 2007 / 15TH BHADRA 1929

SA.No. 156 of 1994(B)

(AGAINST THE JUDGMENT AND DECREE IN THE COURT OF THE ADDITIONAL DISTRICT JUDGE, KOZHIKODE DATED 18/06/93 PASSED IN AS.72/1992 AGAINST THE FINAL DECREE IN I.A.2877/87 IN OS.120/1974 PASSED BY THE ADDL.MUNSIFF, KOZHIKODE-II)

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APPELLANTS/APPELLANTS/RESPONDENTS 5 & 7 IN I.A.2877/87 IN O.S.120/74/DEFENDANTS IN O.S.120/74:

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1. **VARIYATH SARADA AMMA, D/O.PARUKUTTY AMMA, AGED 56 YEARS, THEKKETHADATIL HOUSE, VALAYANAD AMSOM AND DESOM, KOZHIKODE TALUK.**

2. **VARIYATH REMA, D/O.NARAYANA MENON, AGED 24 YEARS, ...DO....DO.....**

BY ADV. SRI.P.S.NANDANAN
SRI.K.V.SACHIDANANDAN

RESPONDENTS: RESPONDENTS:RESPONDENTS IN I.A.2877/87 IN O.S.120/74/R1 TO R3 ARE PLAINTIFFS IN O.S.120/74 OTHERS ARE DEFENDANTS AND LRS OF DEFENDANTS DIED, IN O.S.120/74:

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1. **KANTHAKALI PADMAVATHI AMMA, D/O.KALLIANI AMMA, AGED 79, RESIDING AT THEKKETHADATIL PARAMBA, VALAYANAD AMSOM AND DESOM, KOZHIKODE TALUK.**

2. **KANTHAKALI VIJAYALAKSHMI, D/O.RAGHAVA MENON, AGED 28 YEARS, ...DO...DO...**

3. **KANTHAKALI VARIJAKSHAN, D/O.RAGHAVA MENON, AGED 25 YEARS, ..DO..DO....**

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*4. V.PREMARAJAN, S/O. K.V.NARAYANA MENON, AGED 29, RESIDING AT THEKKETHADATHIL PARAMBA, VALAYANAD AMSOM & DESOM, KOZHIKODE TALUK.(DELETED)

5. C.ARAVINDAKSHA MENON, S/O. CHIRUTHAKUTTY AMMA, AGED 79 YEARS, ...DO..DO....

*6. VARIYATH SREEDHARA MENON, S/O.PARUKUTTY AMMA, AGED 51 YEARS, ...DO...DO....(DELETED)

(*4TH AND 6TH RESPONDENTS DELETED FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANTS VIDE ORDER DTD. 14/06/2007 IN I.A.NO.962/2007)

7. V.DHANALAKSHMI, D/O.CHINNAYYA,AGED 50 YEARS, ...DO....DO.....

**8. C.VINOD, S/O.AMBUJAKSHI AMMA, AGED 57,....DO..DO.....

(**8TH RESPONDENT IS DELETED FROM THE PARTY ARRAY AT THE RISK OF THE APPELLANTS AS PER ORDER DTD. 24/06/04 IN I.A.NO.1191/04)

9. M.C.DHAKSHAYANI AMMA, W/O.ACHUTHA MENON, AGED 52 YEARS ,..DO..DO.... (L.R. OF ACHUTHA MENON)

10. M.C.SOBHANA, D/O.ACHUTHA MENON, AGED 41 YEARS, ...DO...DO.... "

11. M.C.RAJALAKSHMI, D/O.ACHUTHA MENON, AGED 36 YEARS, ..DO..DO.... "

12. M.C.RARJASEKHARAN, S/O.ACHUTHA MENON, AGED 31 YEARS, ...DO...DO.... "

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13. M.C.RAJEEVAN, (D I E D)
S/O.ACHUTHA MENON, AGED 29 YEARS,
.....DO.....DO..... "

14. M.C.RATNAN, S/O.ACHUTHA MENON,
AGED 26 YEARS, ...DO..... "

15. SUBHADRAMMA, W/O.LATE VELYUDHA MENON,
AGED 71 YEARS, LAKSHMI VIHAR,
THEKKETHADATHIL HOUSE, KOZHIKODE.(DIED).

16. GOPALAKRISHNAN,
S/O.LATE VELYUDHA MENON, AGED 48 YEARS,
....DO...DO.....

17. LAKSHMI DEVI, W/O.PURUSHOTHAMAN, AGED 40 YEARS,
.....DO.....DO.....

18. MADHAVA MENON, S/O.VELAYUDHA MENON, AGED 38 YEARS,
.....DO.....DO.....

19. RAGHUNATH, S/O.VELAYUDHA MENON, AGED 36 YEARS,
.....DO.....DO.....

20. RAJAKUMAR, S/O.VELAYUDHA MENON, AGED 34 YEARS,
.....DO.....DO.....

21. GIRIJA, D/O.VELAYUDHA MENON, AGED 32 YEARS,
.....DO.....DO.....

(LEGAL REPRESENTATIVES OF PETITIONER/LATE VELAYUDHA MENON
IN I.A.NO.2877/87)

RESPONDENTS 15 TO 21 ARE THE WIFE AND CHILDREN OF LATE VELYUDHA MENON WHO ARE HIS ONLY LEGAL HEIRS OF VELYUDHA MENON WAS THE 1ST RESPONDENT IN A.S.72/90 AND THE PETITIONER IN I.A.2877 OF 1987 IN O.S.120 OF 1974.

(#I IT IS RECORDED THAT RESPONDENTS 13 & 15 DIED AND THEIR LR'S ARE ALREADY IN THE PARTY ARRAY OF RESPONDENTS AS PER ORDER DTD. 24/06/04 IN MEMO DTD. 24/06/04)

BY ADV. SRI.K.P.BALASUBRAMANYAN forR7
SRI.KAPPILLIL ANILKUMAR)
SMT.S.BINDU) for R16 to R21

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 06/09/2007 ALONG WITH AS NO. 562 OF 1997,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

ORDER ON C.M.P.NOS.248/1994 AND 1971/1996 IN S.A.NO.156/1994

DISMISSED

6/09/2007 **SD/- M.SASIDHARAN NAMBIAR, JUDGE**

/TRUE COPY/

P.A. TO JUDGE

M.SASIDHARAN NAMBIAR,J.

S.A.NO.156 OF 1994
&
A.S.NO.562 OF 1997

Dated 6th September 2007

J U D G M E N T

Appellants in S.A.156 of 1994 are respondents 5 and 7 in I.A.2877 of 1987, the final decree application first respondent, the second defendant in the suit, is the petitioner in I.A.2877 of 1987 and other respondents the other respondents in the final decree and defendants in the suit. O.S.120 of 1974 was filed by Padmavathi Amma and her children, claiming partition and separation of her share in the plaint schedule property. Defendants 1 to 5 in their written statement claimed separation of their shares in the plaint schedule property. 8th defendant an assignee from the first defendant had contended in suit that as per two assignment deeds executed by first defendant and marked in the suit, he obtained 7 and 2/9 cents in the property and it is not liable to be partitioned. The preliminary decree was passed on 6/3/1976 providing that plaint schedule properties

are to be divided into 9 equal shares and three such shares are to be allotted to second defendant and the remaining 6/9 shares jointly to defendants 3 to 5. Claim for share by plaintiff and first defendant were disallowed. It was found that first defendant has no right over the plaint schedule property. Claim for exclusion of the property by 8th defendant was rejected, holding that as his assignor first defendant had no right in the property at the time of execution of the sale deeds and he had no right to be conveyed to 8th defendant, 8th defendant is not entitled to any reservation. The preliminary decree was challenged in first appeal and second appeal unsuccessfully. Admittedly final decree became final. I.A.2877 of 1987 was filed for passing a final decree in accordance with the preliminary decree. A Commission was appointed, to divide the property in accordance with the preliminary decree. Commissioner submitted Ext.C1 report and Exts.C2 and C3 accounts and Ext.C4 plan, dividing the properties and allotting respective shares to second defendant and defendants 3 to 5 together. As objections were raised, reports and plan were remitted and Commissioner submitted Exts.C5 to C9 reports, plan, fresh valuation

and account. Objections were raised on the allotments and valuation. Trial court passed a final decree in accordance with the allotment made by the Commissioner in Ext.C4 plan in 1991.

2. The final decree was challenged before District court, Kozhikode in A.S.72 of 1992 by respondents 5 and 7 in the final decree application. 8th defendant filed a separate appeal as A.S.116 of 1992. A.S.72 of 1992 was separately heard and disposed by learned District Judge as per judgment dated 18/6/1993. As is clear from that judgment, pendency of A.S.116 of 1992 was not brought to the notice of the learned District Judge while disposing A.S.72 of 1992 and therefore first appeal filed by respondents 5 and 7 alone was heard. Learned District Judge on re-appreciation of evidence and on perusing the records found that objections raised by parties were not specifically considered by the trial court before passing final decree. Therefore learned District Judge considered each and every objections raised by the parties and confirmed the valuation and allotment but modified the final decree holding that there was no necessity to make Exts.C5 to C9 as part of the final

decree and only Ext.C4 plan need be made part of final decree. As per the modified final decree, plots E,F,H,I,J,K,L,M,O shown in Ext.C4 plan were allotted to share of final decree petitioner, second defendant and plots A,B,C,D including D1 and D2, d, G and N shown in Ext.C4 plan were allotted to the share of defendants 3 and 5. For equalisation of shares defendants 3 to 5 were directed to pay an owelty amount of Rs.23,736.17 to second defendant, creating a charge in properties allotted to defendants 3 to 5. Second defendant was also awarded share of profits at the rate of Rs.559.50 per annum from 16/2/1974 till second defendant obtained possession of the properties allotted to him or for three years from the date of the final decree which ever event occurs first.

3. S.A.156 of 1994 is filed challenging the final decree as modified by the District court. When it was pointed out that the first appeal filed by 8th defendant challenging the final decree is still pending before District court, Kozhikode as A.S.116 of 1992, it was called for to this court and renumbered as A.S.562 of 1997 and heard along with the second appeal.

4. Second appeal was admitted formulating

following substantial question of law.

> Whether, having found that trial court had not properly considered the objections raised by parties to the report of the Commissioner before passing the final decree, lower appellate court was justified in passing final decree in the light of various objections raised by appellants.

5. Learned counsel appearing for appellants in second appeal as well as appellant in A.S.562 of 1997 and the contesting respondents were heard.

6. Arguments of learned counsel appearing for appellants in the second appeal is that serious objections were raised to the allotment, valuation and quantum of share of profits fixed by the Commissioner and trial court did not consider the objections and though first appellate court considered the objections, they were not properly considered and therefore the final decree and judgment passed by the courts below are to be set aside. Learned counsel argued that Commissioner did not provide sufficient space to house allotted to appellants as plot G and also valued house at exorbitant price ignoring the fact that the building

was aged more than 70 years. According to the learned counsel calculation of stones and timber assessed made by Commissioner are excessive and value should be much lower than what was assessed in the report and accepted by the courts below. It was also argued by the learned counsel that objection raised by appellants that Meenakshi, a karaima tenant is in possession of plot A was not considered and that plot should have been excluded from division and as it was not done the decree is not sustainable. It was further argued that while value of building assessed was exorbitantly, land was valued at a lesser rate and consequently owelty amount to be paid by appellants is much more than the actual owelty amount payable and that objection was not properly considered. It was also argued that share of profits should not have been awarded from the date of suit and it should have been restricted from date of the final decree. It is therefore argued that the decree and judgment are to be set aside.

7. Learned counsel appearing for appellant in A.S.562 of 1997 argued that 8th defendant is in possession of the property covered under Exts.B6 and B7 assignment deeds marked by the court in the preliminary

decree and no decree for recovery of possession was sought in the suit and as 8th defendant has been in possession of the property covered under the said assignment deeds, the said property should have been excluded from the final decree. It was also argued that as no decree for recovery of possession was sought for or granted the final decree application should have been dismissed as against 8th defendant a stranger in possession of the property.

8. Learned counsel appearing for respondents 16 to 21, the legal heirs of deceased second defendant, who were subsequently impleaded in the appeal on the death of second defendant, argued that each and every objections raised by appellants in S.A.156 of 1994 were considered by first appellate court in detail and there is no reason to interfere with said findings and in any event, it is not substantial question of law and therefore on that sole ground the second appeal is to be dismissed and the findings of the courts below cannot be disturbed. Learned counsel also argued that case of 8th defendant that the property got assigned by him from first defendant shall be excluded from partition was rejected in the preliminary decree and it is final and

in such circumstances, appellant in A.S.562 of 1997 is not entitled to seek any relief in the final decree and both the appeals are only to be dismissed.

9. As per the preliminary decree only defendants 2 to 5 are entitled to a share in the plaint schedule property. Three shares were allotted to second defendant and six shares jointly to defendants 3 to 5. First defendant who claimed a share in the property was not allotted any share finding that he has no right in the decree schedule property. Commissioner has divided the property into different plots and allotted separate plots to the sharers in accordance with the preliminary decree. Though objections raised by the parties were not considered in detail by the trial court while passing the final decree, first appellate court which is the final fact finding authority, specifically considered each and every objections raised by the parties. Learned District Judge finding that though trial court is bound to consider objections filed by parties to the report and plan submitted by the Commissioner and their objections were not considered all the objections were considered in detail. In such circumstances, for the reason that trial court did not

consider the objections, final decree cannot be interfered.

10. Learned counsel appearing for appellants in S.A.156 of 1994 was asked to point out valid objections which are not considered or were not properly considered by the first appellate court. Objections pointed out by the learned counsel are

1) Non allotment of sufficient space to the residential house allotted to appellants.

2) Excessive valuation of the residential building.

3) Non exclusion of plot A, which is allegedly in the possession of Meenakshi, a karaima tenant.

4) Incorrect fixation of owelty amount due to high valuation of the building and law valuation of land.

The only other objection raised by the learned counsel was that share of profits should have been restricted from the date of the decree. That objection on the face of it will not lie, in the light of the preliminary decree which specifically provide that defendants 3 to 5

shall pay the share of profits due to second defendant from the plaint schedule property "from the date of plaint". Even though appellants challenged the preliminary decree appeals were dismissed. In view of the preliminary decree second defendant is entitled to get share of profits from the date of the institution of suit. Appellants are not entitled to challenge it or to contend that final decree providing for payment of share of profits from the date of suit is unsustainable.

11. Though learned counsel appearing for appellants argued that plot A should have been excluded from division in view of existence of a karaima tenant, in view of the preliminary decree appellants are not entitled to raise that contention also. In the suit appellants did not raise a contention that there is a karaima tenant in the plaint schedule property and the property in the possession of the karaima tenant is to be excluded. When in the preliminary decree it was found that the entire plaint schedule property is available for partition, appellants are not entitled to contend that there is a karaima tenant by name Meenakshi in plot A and plot A is therefore to be excluded. That

objection is also unsustainable. Objections with regard to non allotment of sufficient space to the residential building in plot G was considered by the first appellate court and rejected. Ext.C4 plan shows that residential house is almost in the middle of plot G and there is sufficient space on all the four sides of the house. In such circumstances, that objection is also unsustainable.

12. Objection with regard to valuation of the building and assessment of share of properties were also considered by the first appellate court in detail. As rightly pointed out by learned counsel appearing for contesting respondents, apart from filing objection appellants neither cross examined the Commissioner nor adduced any other evidence to prove that valuation or income assessed or land value is not correct. In such circumstances, objection with regard to the valuation of building and land was rightly rejected by first appellate court. In any event it is a factual finding which cannot be interfered in exercise of the powers of this court under Section 100 of Code of Civil Procedure. Objection with regard to owelty amount is therefore not sustainable. Hence the second appeal is

only to be dismissed.

13. Judgment in O.S.120 of 1974 shows that contention of 8th defendant, appellant in A.S.562 of 1997, was that he is an assignee of 7 and 2/9 cents from first defendant for valuable consideration and therefore that property is not available to be partition. Learned Munsiff in paragraph 26 of the judgment found that Exts.B6 and B7 sale deeds relied on by 8th defendant was executed by first defendant and it is proved that first defendant has no share or right in the property at the time of execution of the said sale deeds and therefore assignment deeds were obtained from first defendant, who had no interest in the property. It was therefore found that 8th defendant is not entitled to any reservation and preliminary decree has become final. In the light of the preliminary decree, 8th defendant is not entitled to contend in the final decree proceeding that the property covered in Exts.B6 and B7 should have been excluded from division. As an assignor of first defendant who had no right in the property, 8th defendant is not entitled to raise any claim in the final decree application. In such circumstances, A.S.562 of 1997 filed by 8th defendant can

only be dismissed.

There is no merit in both the appeals. The appeals are dismissed but without cost.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.156 OF 1994

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A.S.NO.562 OF 1997

6th September 2007

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